STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of the Estate of DOROTHY LULIC,
Deceased.

JOHN MCCORMACK, as Personal Representative of the Estate of DOROTHY LULIC, and MICHAEL ELICH,

Appellees,

v

LILLIAN TOCCO,

Appellant.

UNPUBLISHED
August 4, 1998

No. 203926
Wayne Probate Court
LC No. 92-513869-IE

Before: Markman, P.J., Saad and Hoekstra, JJ.

PER CURIAM.

Petitioner, Lillian Tocco, appeals as of right from a judgment upholding the will and finding no cause of action as to the will contest. We affirm.

Petitioner filed a petition with the probate court contesting a will executed by her sister, Dorothy Lulic (hereinafter the deceased). Petitioner alleged that the deceased was not possessed of sufficient testamentary capacity to execute the will. In addition, petitioner alleged the devisees under the will exercised undue influence upon the deceased so as to place the deceased under duress. The will devised the bulk of the deceased's estate to her brother, Michael Elich (hereinafter `Elich') and only $1 to petitioner. Essentially then, this dispute pits brother against sister.

Petitioner's first claim on appeal is that the will should have been set aside because it was a product of undue influence. We disagree. A claim of undue influence may invalidate a will where the contestant of the will can show that an outside influence negated the testator's right and ability to exercise her own discretion in disposing of her property. *In re Sprenger's Estate*, 337 Mich 514, 521-22; 60 NW2d 436 (1953). Undue influence is demonstrated, in part, where the testator was

subject to physical or moral coercion, threats, fraud, undue flattery, or misrepresentations which have the effect of destroying the testator's inclinations and free will. *Kar v Hogan,* 399 Mich 529, 537; 251 NW2d 77 (1976); *Sprenger, supra,* at 522; *In re Leone Estate,* 168 Mich App 321, 324; 423 NW2d 652 (1988); *In re Mikeska Estate,* 140 Mich App 116, 120; 362 NW2d 909 (1985). Such influence must actually be exerted and effectively deprive the testator of his free will. *Sprenger, supra,* at 522.

However, in certain situations undue influence will be presumed. *Kar, supra,* at 537. Undue influence is presumed, for example, when the evidence establishes: (1) There was a confidential or fiduciary relationship between the testator and a devisee; (2) the fiduciary benefited from the will; and, (3) the fiduciary had the opportunity to influence the testator's decision in devising the estate. *Kar, supra,* at 537; *Leone, supra,* at 324-25; *Mikeska, supra,* at 121. Once a fiduciary relationship has been established, there is a mandatory inference of undue influence and the burden of going forward shifts to the proponent of the will, although the burden of proof remains with the party opposing the will. *Leone, supra,* at 325; *Mikeska, supra,* at 121. When a person receives benefits derived from a fiduciary relationship, then it is assumed such benefits were obtained through undue influence. *Leone, supra,* at 325; *Habersack v Rabaut,* 93 Mich App 300, 305; 287 NW2d 213 (1979). If the opponent of the will fails to establish a fiduciary relationship, then it is, alternatively, the opponent's burden to show undue influence in the absence of such a relationship. *Fenkell v Bakhaus,* 21 Mich App 266, 275; 175 NW2d 849 (1970).

Petitioner argues that Elich had a power of attorney over the deceased until her death, and, therefore, was the deceased's fiduciary. However, after reviewing the lower court record, we conclude that any power of attorney held by Elich was effectively revoked by the deceased while she was in the Saratoga Hospital in October 1991, approximately six months prior to the execution of the will. Petitioner failed to demonstrate there was a confidential or fiduciary relationship between the deceased and Elich such that Elich had an opportunity to influence the deceased's decisions in devising her estate at the time the will was drafted. *Kar, supra,* at 537. We do not believe the law requires that a power of attorney, particularly one held by a brother in behalf of his sister, serves beyond the life of such power to raise an adverse inference with regard to abuse of a fiducicary relationship. Nor have we been apprised of such law by the petitioner.

Petitioner also failed to show that there was undue influence here in the absence of a fiduciary relationship. *Fenkell, supra,* at 275. Elich did not see the deceased from November 1991 until June 1992. The will was executed in May 1992. Elich was not even in the state at the time of its execution. Therefore, the deceased could not have been subject to physical or moral coercion, threats, fraud, undue flattery, or misrepresentation by Elich which had the effect of destroying the deceased's inclinations and free will. *Kar, supra,* at 529, 537. Petitioner failed to present evidence that any influence was actually exerted which negated the deceased's right and ability to exercise her own discretion in disposing of her property. *Sprenger, supra,* at 521-22.

Petitioner's second issue on appeal is that the deceased lacked the testamentary capacity to make a will. Again we disagree. The burden of showing that the testator lacked capacity is upon the contestants of the will. *In re Vollbrecht Estate,* 26 Mich App 430; 182 NW2d 609 (1970). The

contestant must demonstrate that the incompetency existed at the time that the will was drafted. *Id.* The Court will not look to the fairness, equity or lack of wisdom in the dispositions made in the will and reason backwards in determining whether the testator was competent. *Id*. In addition, evidence of advanced age, forgetfulness and relative weakness of mind are insufficient in themselves to invalidate a will. *Id*.; *Vollbrecht, supra,* at 434-35.

Petitioner argues the deceased lacked testamentary capacity because of a previous stroke which had caused her to become forgetful and which rendered her physically incapable of taking care of herself. We conclude that the deceased did not, therefore, lack the capacity to draft her will. Several witnesses testified the deceased was fully cognizant of her family, her possessions and her circumstances. Such evidence indicates the deceased had sufficient mental ability to know what her property consisted of and who the natural objects of her bounty might be. *In re Walker's Estate,* 270 Mich 33, 37; 258 NW2d 206 (1935). Petitioner did not present any evidence which would indicate the deceased did not understand the disposition she made of her property. *Id.* In addition, a guardian ad litem specifically testified that the deceased was competent only one month prior to the drafting of the will. Petitioner did not offer expert testimony that would lead this Court to conclude that the deceased was incompetent. The deceased's confusion as to dates, and her occasional lapses in memory, do not amount to incompetency. *Sprenger, supra,* at 521; *Vollbrecht, supra,* at 434-35.

Affirmed.

/s/ Stephen J. Markman
/s/ Henry William Saad
/s/ Joel P. Hoekstra